

Supreme Court, U. S.  
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In The

# Supreme Court of the United States

OCTOBER TERM 1976

—  
No. 76-282  
—

DR. DON M. SMART,

*Petitioner,*

v.

CLARENCE JONES, et al.,

*Respondents.*

—  
**BRIEF IN OPPOSITION TO PETITION  
FOR CERTIORARI**

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This Brief in opposition to the petition for certiorari is respectfully submitted on behalf of the respondents Henry Wade, Criminal District Attorney for Dallas County, Texas, and Lem Brotherton and John Tolle, Assistant District Attorneys.

**STATEMENT OF THE CASE**

Petitioner's statement of the case is replete with serious, material misstatements and omissions, and thus is badly misleading. We therefore here restate the case and its facts.

The cause arose as a complaint by Don M. Smart against ten individual defendants and one corporate defendant for

numerous alleged violations of his civil rights. Don Smart's complaint against the respondents Wade, Tolle and Brotherton alleged that they, as prosecuting attorneys, accepted a criminal complaint and filed a criminal charge against him without adequate investigation, insisted upon the prosecution of same, and undertook the representation of the Sheriff and his deputies in the Civil Rights suit filed by Nancy Gayle Smart, Don Smart's wife.

The respondents Wade, Tolle and Brotherton filed their motion for summary judgment, supported by the depositions of themselves and all other parties (except for Judge Orvis who had been dismissed as a party) on November 27, 1974. The Court heard arguments on the motion on December 19, 1974. Summary judgment was entered in favor of all respondents on May 30, 1975.

#### STATEMENT OF THE FACTS

This litigation arose from the same fact situation which this Court has earlier considered in the case of *Nancy Gayle Smart v. Jones, et al.*, 493 F.2d 633, reh. den. 495 F.2d 1372; certiorari denied 41 US 1090, reh. den. 420 US 939 (1975).

On September 11, 1972, Deputy Sheriff Grandstaff went to the residence of Don Smart to serve Don Smart with a notice of a condemnation hearing. There he encountered Nancy Gayle Smart, to whom he announced his identity and purpose. She went into the house and came out in a few minutes with Don Smart, and they engaged in an apparent conversation in the driveway. Then Don Smart got into one of the cars parked in the driveway and drove across the lawn to get around Grand-

staff's car, which was still parked in the driveway (Don Smart's residence was a thirty-five acre estate, and the driveway was approximately one quarter of a mile in length). Grandstaff followed in his car, intending to serve the condemnation notice. During the course of the drive, Don Smart repeatedly hit his brakes in what Grandstaff perceived to be an attempt to cause Grandstaff's car to ram the rear of the car driven by Don Smart. Meanwhile, Nancy Gayle Smart had followed in another car. During the course of the drive along the public streets of Dallas, Don Smart and Nancy Gayle Smart, acting in concert, maneuvered their cars in such a way that Nancy Gayle Smart was able to force Grandstaff's car to the curb. Just as she did so, Don Smart changed lanes, stopped, backed up beside Grandstaff's car, went down a side street, and fled the scene. Grandstaff radioed for assistance over his police radio, and other officers arrested Nancy Gayle Smart a few moments and a few blocks from the scene.

Grandstaff made a report of the facts concerning the incident and presented it to the respondent Lem Brotherton, the assistant district attorney charged with the duty of processing complaints by law enforcement agencies. Brotherton took Grandstaff's affidavit, and based upon his representations, filed an information charging Don Smart with the misdemeanor offense of aggravated assault. The information was filed in County Criminal Court No. 2 of Dallas County. Based upon Grandstaff's affidavit and the information filed, the Clerk of the Court issued a writ of habeas corpus for Don Smart's arrest, and he was later arrested under its authority.

Respondent Tolle's connection with the case was in his ca-

pacity as assistant district attorney representing the State on a motions hearing and on a few docket settings. He later filed a motion to dismiss the criminal charge against Don Smart, and the charge was dismissed five months before Don Smart filed the instant Civil Rights case. Respondent Wade had no active part in the criminal case against Don Smart.

#### ARGUMENT

##### I.

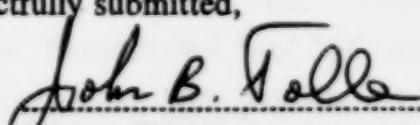
#### **SUMMARY JUDGMENT WAS PROPERLY RENDERED IN FAVOR OF THESE RESPONDENTS.**

The pleadings and depositions before the District Court showed without contradiction that these respondents acted at all times within the scope of their duties as prosecuting attorneys in initiating and pursuing the criminal prosecution against Don Smart, and summary judgment in their favor was proper. *Imbler v. Pachtman*, ... US ..., 96 S.Ct. 984, 47 L.Ed.2d 128 (1976).

#### CONCLUSION

For the reason stated above, respondents pray that the writ be denied.

Respectfully submitted,



HENRY WADE

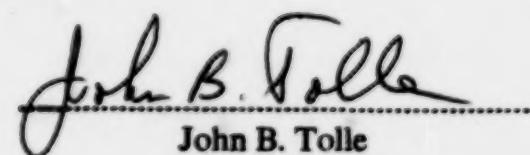
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#### **CERTIFICATE OF SERVICE**

I, John B. Tolle, a member of the Bar of the Supreme Court of the United States, do hereby certify that I have served copies of the foregoing Brief in Opposition to Petition for Certiorari on behalf of Petitioner, by depositing the same in the United States Mail, first-class postage prepaid, on this the 17 day of September, 1976, addressed to S. L. Lewis, Esq., 5614 Richmond Street, Dallas, Texas, 75206, and to Don M. Smart, 10611 Garland Road, Dallas, Texas, 75218, as counsel of record for Petitioner, and to Earl Luna, 1002 Dresser Bldg., 1505 Elm Street, Dallas, Texas, 75201, and to Frank M. Ryburn, Jr., 1511 Fidelity Union Life Bldg., 75201, as counsel of record for other respondents.



John B. Tolle